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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER, Plaintiff, vs. HARRAH'S ENTERTAINMENT, INC. and DOES 1 through 100, inclusive, Defendants.	CASE NO. 07 CV 2226 DMS (POR) Judge: Hon. Dana M. Sabraw Mag. Judge: Hon. Louisa S. Porter POINTS AND AUTHORITIES IN SUPPORT OF *SPECIALLY APPEARING* DEFENDANT'S *EX PARTE* APPLICATION FOR ORDER STRIKING THE NEWLY SUBMITTED MATTER PRESENTED IN KINDER'S REPLY IN SUPPORT OF MOTION TO FILE AN AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR A CONTINUANCE TO ALLOW *SPECIALLY APPEARING* DEFENDANT 14 DAYS TO FILE A SUR-REPLY AND RELATED PLEADINGS ACCOMPANYING PLEADINGS: *EX PARTE* APPLICATION; DECLARATION OF RONALD R. GIUSSO; [PROPOSED] ORDER

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I.

INTRODUCTION

An opposing party's due process rights are violated when a court considers newly submitted evidence filed with a reply brief. KINDER waited until the very last moment to amend his complaint after briefing on the pending Rule 12 Motion to Dismiss was already completed to add Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc., as additional defendants to his complaint. Between the time of receiving the alleged telephone calls from these entities and filing his Motion to Amend, KINDER had ample time to decide what evidence he would use to support his motion. Moreover, when he chose to file a motion to file an amended pleading, KINDER had the information needed to file the proposed pleading. Instead of providing HARRAH'S ENTERTAINMENT, INC. ("*Specially Appearing* Defendant") with the proposed pleading and supporting documents, KINDER chose to suppress this information and deny *Specially Appearing* Defendant their right to fully oppose KINDER's motion to amend. Notably, all of the evidence KINDER included was available to KINDER when he filed his motion.

Now, KINDER submits a reply in support of that motion with nine (9) new exhibits not included in his moving papers, and a proposed amended pleading and facts related to a new "investigation" purportedly conducted by Attorney Austin. This Court must not consider KINDER's exhibits, new arguments and proposed complaint as they are untimely. To consider these new matters without first allowing *Specially Appearing* Defendant a chance to respond would be violative of *Specially Appearing* Defendant due process rights. Accordingly, should this court choose to admit KINDER's untimely evidence and proposed pleading, *Specially Appearing* Defendant respectfully requests this Court continue the hearing on KINDER's motion for leave to amend his complaint for 14 days, to February 8, 2008 and allow *Specially Appearing* Defendant to file a sur-reply and related pleadings addressing KINDER's newly-filed evidence and proposed amended pleading in support of his reply brief.

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II.

THE COURT SHOULD NOT ENTERTAIN THE NEW ARGUMENTS, EVIDENCE AND PROPOSED COMPLAINT INTRODUCED IN KINDER'S REPLY BRIEF.

It is inappropriate for a movant to introduce different arguments or new evidence in the reply brief rather than providing it in the moving papers. (*See, Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-895 (1990).) The court has the discretion to disregard late-filed factual matters. (*Id.*) An opposing party's due process rights are violated and a trial court abuses its discretion if the court considers new evidence and/or new legal arguments filed for the first time in support of a reply brief. (*See, Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164-1165 (10^{th} Cir. 1998).)

Pursuant to Civil Local Rule 7.1.e.1, any notice of motion plus all necessary supporting documents requires a minimum filing date of 28 calendar days prior to the Monday for which the matter is noticed. KINDER was required to submit a copy of all documentary evidence which he intended to support his motion with his moving papers. (Civil Local Rule 7.1.f.2.a.) Because, KINDER failed to file his supporting papers, **his failure may be deemed a waiver of his motion.** (Civil Local Rule 7.f.2.b.)

Recognizing the insufficiency of his motion, KINDER introduces for the first time in his reply, nine (9) new exhibits and a proposed complaint in his reply. KINDER's Reply exhibits "A" through "I" and his proposed amendment must not be entertained by this Court as these exhibits were filed untimely. Although, in some instances, Courts may allow new evidence at the reply stage (so long as the Court affords the opposing party opportunity to respond), it may only do so if the facts were **unforseen** at the time of the opening brief. (*Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 767 F. Supp. 1220, 1235 (S.D. NY 1991).)

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KINDER cannot argue Exhibits "A" through "I" and his proposed amended complaint were unforeseen supporting documents at the time of filing his motion. In fact, several of the exhibits themselves and Attorney Chad Austin's declaration in support of the reply specifically state Exhibits "A", "C", "D", "G", "H" and "I" **were in KINDER's possession on December 11, 2007 and December 17, 2007**. Additionally, although Exhibits "B", "E" and "F" are dated January 17, 2008, KINDER provides this Court with no good reason why these exhibits were "unforeseen" supportive documents. In addition, KINDER readily admits his complaint "differs in no way from the original complaint in this action," therefore, he cannot provide the Court with evidence that his proposed complaint could not have been attached in the first place. By attaching the proposed complaint and new exhibits to his Reply, rather than his motion, KINDER is in clear and utter violation of the 28-calendar day requirement, therefore, this new information must not be considered by the Court.

Moreover, KINDER's new argument that *Specially Appearing* Defendant's Marketing Services Corporation and Harrah's Operating Company, Inc., consented to suit in California is a completely new argument which necessarily must be stricken as untimely. As evidenced by Attorney Austin's declaration in support of KINDER's reply, Attorney Austin conducted searches of the California Secretary of State websites on January 17, 2008, ***after*** his motion to amend was on file. KINDER provides this Court with no reason why he did not include this information in his moving papers or conduct this research earlier. To entertain KINDER's argument that appointment of a registered agent for service is consent would deny *Specially Appearing* Defendant their due process right to a fair hearing on the merits of the motion to amend. KINDER is factually and legally wrong and *Specially Appearing* Defendant must be permitted an opportunity to present such evidence to this Court.

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III.

KINDER'S EXHIBITS ARE INADMISSIBLE AND FACTUALLY INVALID

KINDER'S exhibits should be stricken as untimely, but they should also be stricken because they are factually invalid and constitute unsustainable evidentiary support of KINDER's baseless allegations against *Specially Appearing* Defendant.

KINDER has offered various website printouts which purport to be from "FASTweb", the Nevada Secretary of State and the California Business Portal in a last minute effort to save his deficient motion to amend. He proffers these exhibits to illustrate that this Court somehow has personal jurisdiction over the entities he proposes to name. However, KINDER has forgotten that he must first prove that these entities make telephonic marketing calls. Nowhere in his reply does KINDER address the fact that he has reason to believe that Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc., make pre-recorded telemarketing calls. In fact, KINDER's silence on this fact is deafening and should be construed as an admission.

Additionally, KINDER attaches three (3) purported "FASTweb" website printouts, one (1) website printout from the Nevada Secretary of State, two (2) purported California Business Portal website printouts and three (3) purported Harrahs.com website pages. Not only were all of these exhibits available to KINDER at the time of his motion, each and every one of these documents lack foundation, contain inadmissible hearsay and have not been properly authenticated under the Federal Rules of Evidence. Simply conducting internet searches and printing results does not mean the documents are true and admissible.

Exhibits "A" through "I" are inadmissible hearsay. Federal Rule of Evidence 801 provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (F.R.E. 801(c).) Federal

Rule of Evidence 801 further provides that a "statement" includes both "oral [and] written assertion[s]." (F.R.E. 801(a).) Web postings are "statements" subject to the hearsay exclusion." (*United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000))holding statements posed on web sites by nonparties were inadmissible hearsay).) Federal Rule of Evidence 802 provides that hearsay evidence is not admissible unless it falls under a statutorily-enumerated exception to the hearsay exclusion. (F.R.E. 802.)

In addition, exhibits "A" through "I" lack foundation. Federal Rule of Evidence 1002 provides, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by Act of Congress." (F.R.E. 1002.)

The copy of the printouts from Harrah's website, Nevada Secretary of State and the California Business Portal are clearly written statements within the meaning of Federal Rule 801(a). Further, the statements contained in the website printouts are being offered to prove the truth of the matters asserted therein, namely: (a) that there is some connection or partnership between the proposed entities and various casinos; or (b) that certain entities have agents for service of process in Calfornia. Because these website printouts are clearly out of court statements offered to prove the truth of the matter asserted, they must be excluded. Furthermore, the website printouts violate Federal Rule of Evidence 1002 in that they are not purported to be originals and must be excluded based thereon. They violate Federal Rule 901 as they have not been properly authenticated.

Accordingly, *Specially Appearing* Defendant respectfully requests this court strike KINDER's new exhibits, new arguments and proposed amendment.

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IV.

IN THE ALTERNATIVE, DUE PROCESS REQUIRES *SPECIALLY APPEARING* DEFENDANT HAVE AN OPPORTUNITY TO REBUT KINDER'S NEWLY PRESENTED EVIDENCE, ARGUMENTS AND PROPOSED PLEADING

Should the Court choose to admit KINDER's newly presented evidence, due process requires the court to allow *Specially Appearing* Defendant an opportunity to file a sur-reply. (*See, Alexander v. FBI* (D.D.Cir. 1998), 186 FRD 71; *Lewis v. Rumsfeld*, 154 F.Supp. 2d 56 (D.D.C. 2001); *Ben Kotel v. Howard University*, 319 F. 3d 532 (D.C. Cir. 2003).) "The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." (*Lewis v. Rumsfeld,* 154 F. Supp. 2d at 61, *citing, Alexander v. Federal Bureau of Investigation,* 186 F.R.D. at 74.) Here, *Specially Appearing* Defendant necessarily needs a reasonable opportunity to respond to and address KINDER's newly presented material. (*Beaird v. Seagate Tech., Inc.* 145 F.3d 1159, 1164-1165 (10^{th} Cir. 1998).)

Here, KINDER has submitted nine new exhibits, a proposed complaint and new arguments in his reply. KINDER's new exhibits are inadmissible because they lack foundation, contain hearsay statements are not authenticated documents. The proposed complaint cannot withstand a motion to dismiss and KINDER's new arguments are meritless. *Specially Appearing* Defendant respectfully requests a fourteen day continuance to file a sur-reply to address the deficiencies, inadmissibility and inappropriateness of KINDER's newly-presented evidence, arguments and proposed amended complaint attached to his reply. Therefore, pursuant to *Lewis* and *Alexander*, *Specially Appearing* Defendant has made a sufficient showing that the opportunity to file a sur-reply is warranted and necessary. (*See, Lewis v. Rumsfeld,* 154 F. Supp. 2d. at 61, *citing, Alexander v. Federal Bureau of Investigation,* 186 F.R.D. at 74.)

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V.

SPECIALLY APPEARING DEFENDANT WILL SUFFER SIGNIFICANT PREJUDICE IF THIS _EX PARTE_ IS NOT GRANTED

KINDER's choice to submit evidence in his reply rather than his moving papers, was conducted in complete contravention of the notion of fairness through the judicial process. This court should not allow KINDER to benefit from these underhanded litigation practices. Not only do his actions violate due process by depriving *Specially Appearing* Defendant of its opportunity to be heard on the allegations it but it also deprives it of its right to notice of the allegations.

Additionally, if this *ex parte* is not granted, tremendous time and expense to the court will be consumed in hearing five new Rule 12 motions to dismiss each corporate entity on the basis of lack of personal jurisdiction and for suing the wrong entities. *Specially Appearing* Defendant will incur substantial costs and fees in having to burden the Court with these additional motions. Moreover, judicial economy favors the striking of KINDER's untimely newly-submitted evidence in an effort to subvert yet another one of KINDER's attempts to clog up this District's overburdened caseload with the business of his 999-9999 litigation. KINDER can articulate no harm if *Specially Appearing* Defendant's *ex parte* is granted as the newly submitted evidence, arguments and proposed complaint should have been included with his moving papers in the first place.

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VI.

CONCLUSION

Based on the foregoing, *Specially Appearing* Defendant respectfully requests that this Court strike KINDER's Exhibits "A" through "I" to his Reply, strike his jurisdiction arguments and strike his proposed amended complaint. Should the Court not agree that these matters be stricken, *Specially Appearing* Defendant respectfully asks the court to grant leave to file a sur-reply and related pleadings and continue the hearing date for no less than 14 days.

SHEA STOKES ROBERTS & WAGNER, ALC

Dated: January 21, 2008

By: /s/ Ronald R. Giusso
Maria C. Roberts
Ronald R. Giusso
Attorneys for *Specially Appearing* Defendant
HARRAH'S ENTERTAINMENT, INC.